No. 3608

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THE STEAMSHIP "PORTLAND", her engines, boilers, boats, tackle, apparel, furniture and appurtenances, and THE NATIONAL SURETY COMPANY (a corporation),

Appellants,

vs.

UNION OIL COMPANY OF CALIFORNIA (a corporation),

Appellee.

MEMORANDUM ADDITION TO BRIEF FOR APPELLANTS.

Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, First Division.

ANDROS & HENGSTLER,
LOUIS T. HENGSTLER,
Proctors for Appellants.

PERNAU-WALSH PRINTING CO.

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The Millinocket, 266 Fed. 392:

1. A *bunkering contract* between libelants and charterer obligated libelants to supply all the vessels chartered by a charterer.

Held: Libelants cannot assert a lien, because "this indicates that the libelants dealt with [the charterer]

personally", and did not rely upon the credit of the ship.

2. Libelants had notice of the terms of a *charter-party* requiring one not the owner to pay for the fuel.

Held: Libelants are not entitled to a lien.

3. Libelants attempted to collect from charterer for coal delivered on board the vessel before seeking to recover from the vessel.

Held: Any lien against the vessel was *waived* by such attempt.

In the instant case the following facts appear:

(a) Charterer was obligated to provide and pay for all the fuel.

(b) Libelant had notice of this fact (controls holding 2, above, in case cited).

(c) Libelant and charterer had made an oil contract under which libelant was obligated to supply all the oil required by the vessels chartered upon the order and credit of charterer (controls holding 1, above, in case cited).

(d) Under this oil contract libelant had on frequent previous occasions supplied the vessel chartered with oil and been paid therefor by the charterer.

(e) Under the conditions of this oil contract the requisitions in suit were made.

(f) The conditions under which libelant supplied the oil were that, in case charterer should default in

payment, libelant should have either the right to cancel the contract or the right to require prepayment for further supplies. There was no right of lien given by this contract.

(g) All supplies previously furnished were paid by the charterer; the libel in rem was filed because the bills for the supplies in suit had not been paid by the charterer (controls holding 3, above, in case cited).

We also contend that fact (f) constitutes a waiver, in advance, of any lien upon the vessel supplied.

Libelant's strongest reliance is upon the words of the "Memorandum for Stipulation of Facts", reading:

> "IV. From time to time libelant furnished to said steamer 'Portland' fuel oil * * * upon orders FROM the Master" (Apostles, p. 18).

In this connection we recall the following facts:

1. The libel alleges the fuel oil "was furnished *by order of* the master and charterer (p. 10).

2. The answer denies that the fuel oil "was furnished *by order of* the master", and admits that it was furnished by order of the charterer (p. 13).

3. The stipulated facts allege that the fuel oil "was furnished *at the prices and under the conditions specified in said" oil contract* (p. 20).

The fact is, therefore, that ALL THE OIL WAS PROCURED AND FURNISHED UNDER THE CONDITIONS OF THE OIL CONTRACT MADE WITH THE CHARTERER "UPON ORDERS FROM THE MASTER". All the oil required by the charterer for the "Portland" was procured and belonged to

the charterer, by virtue of its contract; the master had nothing to do with getting it, except that, under directions from the charterer, of which libelant was informed, he told libelant, how much of the oil already contracted for was required on particular occasions for the charterer's purposes. In this respect the instant case is not distinguishable from the case of *Curacao Trading Co. v. Bjorje,* 263 F. 693 (C. C. A., 5th Circuit), cited in our brief.

We also cite, for the convenience of the court, the following language used in the *Curacao* case and applicable to the instant case:

> "The coal was not procured by any one having either actual or presumed authority to bind the owner. Furthermore, circumstances either known to the appellant or which it easily could have ascertained made it apparent that it was not to be expected that the owner, or the master for it, would be concerned about this vessel being supplied with the coal required to enable it to proceed on its voyage. The vessel being under a time charter, having several months to run, the hire would not stop while it was waiting at Curacao for lack of coal."

The distinction made by the court in the *Curacao* case, from the decision of the "South Coast" case, on the ground that, in the latter case, *"the charter-party recognized that liens might be imposed by the charterer",* applies equally to the case at bar:

> "In the instant case the coal was ordered, not BY the master, but BY the charterers, who were not expressly or impliedly given authority to subject the vessel to liens for supplies. The case cited is not authority for the proposition that a vessel may

be subjected to a lien for the price or value of supplies furnished to a charterer who is without authority to bind the vessel or its owner therefor. The coal now in question having been procured, not by anyone having authority to bind the vessel for it, but by the charterers, who, under the terms of the charter-party, were, as the furnisher understood, required to pay for such supplies, it is not material that the furnisher thought that the vessel was responsible.''

We submit that this distinction is unanswerable and conclusive, and that the libel filed in this case should be dismissed.

Dated, San Francisco,
March 10, 1921.

Respectfully submitted,

Andros & Hengstler,
Louis T. Hengstler,
Proctors for Appellants.